APPENDIX A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 74-1089, 74-1090 and 74-1091

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARL RAY HOOD, whose true and correct name is ROY ELTON HAWKINS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES CALVIN WARD,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARY DOSS, whose true and correct name is MARY BASE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Oklahoma
[D.C. No. 73-CR-45]

Nathan G. Graham, United States Attorney,
for Plaintiff-Appellee.

James E. Frasier for Defendants-Appellants.

Before MURRAH, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

Defendants were indicted on March 6, 1973 for conspiring to use the mails and interstate wire communications to defraud, and for conspiring to transport goods valued in excess of $5,000 in interstate commerce, knowing the same to have been taken by fraud. Eight persons were indicted; one, Charles Duke (Troy Sumrall) was given immunity; John Cash pleaded guilty to one count; three of the defendants were found not guilty by the jury; the remaining three, appellants here, were found guilty.

In general, the alleged fraudulent scheme had to do with the purchase of goods on credit with intent not to pay for them. The goods were then sold at bargain prices. Appellants raise two issues: the first is insufficiency of the evidence to support a verdict against Mary Base. Secondly, it is claimed that one of the witnesses, John Cash, falsely testified that he had not been offered anything by the government in exchange for his testimony.

Following the convictions, appellants moved for a new trial claiming discovery of new evidence, so it was alleged, revealing that the witness, John Cash, had lied as mentioned above. A hearing was held on the motion. Following this, the judge denied the motion and stated:

> The Court heard all this evidence. The Court observed Mr. Cash and his testimony, and the background of it, and I am convinced from all of the record in this case that the defendants now before the Court, Mr. Hood, (Mr. Hawkins), Mr. Ward and Mrs. Doss or Base, had a fair trial.

1. *Mary Base, a/k/a Mary Doss:* Mary Base was not a leader in the scheme. The government's case against her was that she used an assumed name; that she was related to Hood, the principal operator of the scheme; that she placed one order for goods; and that she participated in some meetings. Apart from these facts, she had had extensive exposure and opportunity to become aware of the scheme. She testified, and the jury was given full opportunity to judge her credibility and to draw the inference of knowing or, on the other hand, unknowing participation. This in our view is adequate, although not overwhelming.

2. *False testimony of John Cash:* Cash was indicted on three counts. Prior to the trial he pleaded guilty to one count and the other two counts were dropped. He was sentenced to the maximum term of five years on

July 21, 1973, subject to modification in accordance with 18 U.S.C. § 4208(b), following receipt of a study.

The trial was held October 31-November 2. Cash testified as a witness for the government. On cross-examination he was asked:

> Q Have you been offered anything for your testimony in this trial whatsoever?
>
> A No, sir.
>
> . . . .
>
> Q No one has discussed what your possible recommendation from their office will be or anything of that nature?
>
> A No, sir, I have not discussed this with Mr. Graham (the prosecutor) or any member of his office. We have only had to pass the time of day.

The evidence as to the falsity of Cash's statement is far from clear. Cash's lawyer gave testimony at the hearing and said that "there was an understanding" that Cash would testify at the trial. The exact testimony is as follows:

> Q Mr. Parks, specifically, sir, was there an understanding that John Cash would testify in the trial of the other co-conspirators?
>
> A Yes.

Q Okay. Was that, sir, the understanding at the time you struck your agreement with Mr. Graham?

A Well, that was certainly inferred, I mean it was.

Mr. Graham, the United States Attorney, made an extensive statement in his "Response and Supporting Brief to Defendants' Motion for New Trial." He said that no commitment whatever was given by him. His statement dealt with whether any promises had been made to Cash by the United States and he stated unequivocally "no such promises were made." He specifically said that there was no understanding that any indictment would be dismissed.

On December 4, 1973, Cash's sentence was modified from the maximum of five years under 18 U.S.C. § 4208(b) to probation for two years.

In view of the fact that the maximum statement of Cash's attorney, Mr. Parks, was that *he* had inferred that Cash was to testify at the trial, presumably from his discussions with the United States Attorney, it strikes us that the testimony in support of the allegation that perjury was committed is weak.

We are mindful that the Supreme Court has severely condemned the suppression of or failure to reveal testimony favorable to the accused. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963). *See also* Giglio v.

United States, 405 U.S. 150 (1972) in which a key witness falsely testified, to the knowledge of the prosecutor, that he had received nothing in return for his testimony. In Napue v. Illinois, 360 U.S. 264 (1959), the defendant was convicted on testimony of a co-felon who had already been sentenced to 199 years. There the witness said that he had received no promise. Later, at a *coram nobis* proceeding wherein the witness was the petitioner, the government revealed for the first time that a promise had been made. The Supreme Court held that inasmuch as a promise had been made the credibility of the witness could have been questioned. Hence, the testimony was material. It vacated the conviction.

Consistent with the cases cited, if a promise of leniency had been made to Cash in return for his testimony reversal would be required. If, on the other hand, no such promise was made or proven the alleged falsity of the testimony would not have been proven. *The trial court did not specifically deal with this issue but, in general, held that the defendants had had a fair trial and would appear to have reviewed the contention.*

Our reaction to the allegation that Cash testified falsely is then that the proof is inadequate. The testimony of Cash's attorney, who actually had the conversation with the United States Attorney, is vague

to say the least. To say that an understanding was to be inferred is much less than saying that an understanding existed. This is not a record capable of establishing the withholding of evidence or the existence of perjury. It is because of the factual weakness that we conclude that appellants are not entitled to relief. It is pointed out by the government that because of the numerous witnesses used and by reason of the fact that there was another accomplice who testified, this evidence is in any event inconsequential. The conclusion which we have reached renders it unnecessary for us to consider this argument.

The judgment is affirmed.

APPENDIX B

JANUARY TERM – FEBRUARY 6, 1975

Before The Honorable Alfred P. Murrah, The Honorable James E. Barrett and The Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff Appellee,

v.

CARL RAY HOOD, a/k/a ROY ELTON HAWKINS; JAMES CALVIN WARD; and MARY DOSS, a/k/a MARY BASE,
Defendants-Appellants.

Nos. 73-1089, 73-1090, 73-1091

This matter comes on for consideration of the petition for rehearing filed by the appellants herein, and for appellants' motion for permission to file the petition out of time.

Upon consideration whereof, the motion for permission to file the petition for rehearing out of time is granted.

It is the further ORDER of the Court that the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

By:_____
Robert L. Hoecker
Chief Deupty Clerk

APPENDIX C

TESTIMONY OF MARY BASE

MARY KAY BASE,

a defendant, called as a witness on behalf of the defendants, being of lawful age and having first been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Tom Frasier:

Q. State your name, please.

A. Mary Katherine Base.

Q. Were you employed by the F & W Industrial Supply?

A. Yes, sir.

Q. Did Carl Hood introduce you to that outfit?

A. Yes, sir, he did.

Q. And to whom did he introduce you?

A. Mr. John Cash.

Q. And were you hired?

A. Yes, sir, I was.

Q. At what salary?

A. $2.00 an hour.

Q. Do you have any knowledge of Mr. Cash, Mr. Duke or Mr. Hood, or anybody else going to buy a bunch of stuff and sell it and then take bankruptcy or anything like that?

A. No, sir, I don't.

Q. Did you do just what you were told out there, Miss Base?

A. Yes, sir, I did.

Q. And who all told you what to do?

A. Mr. Cash and Mr. Duke and sometimes Mr. Hood.

Q. Mr. Hood was out of the office quite a bit, as I understand it?

A. Yes, sir.

Q. But Mr. Cash was there how much?

A. He was there the whole time, in and out of the office, and he stayed in his mobile home place.

Q. Why did you quit there?

A. Because Mr. Cash was drinking and he was, became to be a problem, and I didn't like the way he was acting.

Q. What name did you hire in under?

A. Mary Doss.

Q. And why did you use the name Doss?

A. A girl that had worked in the office previously to me had told me that he had tried to bother her in and out of the office, and I felt that if I changed my name that he couldn't find me where I lived at home, and I felt I could handle myself in the office.

Q. You took that job because you needed it?

A. Yes, sir.

Q. Mrs. Base, did you rent a warehouse somewhere for somebody?

A. Yes, sir, I did.

Q. At whose direction was that?

A. Carl Hood.

Q. How long did you work there?

A. Five weeks.

Q. What were your duties while you were there and what did you do?

A. I answered the telephone and I typed orders that were given to me.

Q. Would the people who were there accept the phone calls there?

A. Yes, sir.

Q. Would they do this even if a call came in for John Cash, and say Carl Hood was there, would he go ahead and take the call?

A. You mean Mr. Cash take the call?

Q. Mr. Hood take the call?

A. I didn't understand, sir.

Q. If Mr. Hood came in and a call came for Cash, would Hood take it sometimes?

A. No, sir, I don't believe so.

Q. The other way around, if a call came in for Hood, would Cash take it?

A. You mean if both of them were there?

Q. Yeah — no, I mean if Cash was there and Hood wasn't.

A. I don't remember. I don't understand what you meant by that.

Q. When the calls came in for one of these people, if they weren't there would somebody else answer on their behalf, is what I am asking.

A. Yes, sir.

Q. Now what did you do in regard to purchase orders?

A. Someone would hand me an order and have me type them up.

Q. Now who all would give these orders to you?

A. Mr. Cooper would and Mr. Duke and Mr. Cash.

Q. Did Mr. Hood ever give you some? Purchase orders, I am talking about.

A. I can't recall. He may have.

Q. Did you ever have any purchase orders in blank that had Charles R. Duke written on them?

A. No, sir.

Q. After you typed them up, would you give them to anybody for signature?

A. To Mr. Duke.

Q. Were there times when he weren't there when you sent out purchase orders in blank that you recall?

A. Not that I recall.

Q. Was it the policy of that concern that Mr. Duke was to sign the purchase orders?

A. Yes, sir.

Q. When you first went there, who were you told was the boss?

A. Mr. Cash and Mr. Duke.

Q. What were you told that Carl Hood's capacity was?

A. He was the manager.

Q. And you were to respond to direction from all three?

A. Yes, sir.

Q. Did you, ma'am, ever know of anyone, two or four of them that got together to purposely go bankrupt or anything like that?

A. No, sir.

Q. Did you ever keep the checking account?

A. I didn't personally handle any of the balance keeping it up to date. I did no book work.

Q. You did no book work?

A. No.

Q. Can you tell me who the bookkeeper was?

A. Right offhand I don't know.

Q. All right, but it was not you?

A. It was not me.

Q. When you typed up these purchase orders, would you place them in the mail?

A. Some of them I did, some of them I would put in an envelope and Mr. Cash would give them to the mailman.

Q. In other words, what I don't understand, you have a pickup delivery of mail out there on East Admiral?

A. The mailman would deliver the mail to the Holiday Mobile Homes office.

Q. Which was whose office?

A. John Cash's office.

Q. And it was his office exclusively, is that right?

A. For Holiday Mobile Homes.

Q. Yes. Now there was a door connecting that one to the next one, is that right?

A. Yes, sir.

Q. Are you any relation to Carl Hood?

A. His wife in my husband's sister.

Q. The answer is either yes or no.

A. Yes.

Q. All right, now you have been here throughout these proceedings, right?

A. Yes, sir.

Q. Can you tell me what your husbands name is?

A. Gaylon Base.

Q. Do you know of your own knowledge if he ever got any paint from the F & W Supply Company?

A. No, sir, I don't.

Q. Do you have any present employment?

A. Right at the moment?

Q. During this period of time, yes, ma'am.

A. I have been hired as a teacher's aide, a substitute teacher's aide.

Q. At what school?

A. Broken Arrow Public Schools.

MR. TOM FRASIER: I have no other questions.

THE COURT: Mr. Graham?

CROSS EXAMINATION

By Mr. Graham:

Q. Why did you state you changed your name to Doss?

A. For the purpose of keeping Mr. Cash from bothering me at my home.

Q. Now Mrs. Base, you testified earlier at a grand jury proceedings, did you not?

A. Yes, sir.

Q. In the case.

I refer you to page 282 of that transcript, in which I asked you this question:

"Q Can you tell us why you chose a different name than Mary Base?

"A I didn't want anyone from the office to be calling my home, so I used a different name.

"Q Well, I'm not so sure I understand the motive behind that.

"A Well, I just didn't want any of the people from the office calling me at my home. My husband knew I was working there but I preferred not to have anyone calling me at my home. We had an unlisted number."

Did you make that statement to the grand jury?

A. Yes, sir, I did.

MR. TOM FRASIER: If the Court please, I am going to object. There is nothing impeaching in that.

MR. GRAHAM: A conflict, your Honor please, with her testimony here this afternoon.

THE COURT: Overruled. Go ahead with the examination. Overrulled.

Q. (By Mr. Graham) Now since you left F & W Industrial Supply, have you had any further business dealings with Mr. Hood?

A. No, sir.

Q. Has your husband?

A. No, sir.

MR. TOM FRASIER: If the Court please, I object to this. It couldn't have any probative value.

THE COURT: Overruled.

Q. (By Mr. Graham) Did they form a corporation?

A. You mean a business corporation?

Q. Yes, ma'am.

A. Yes, sir.

Q. What is the name of it?

A. Tulsa Mobile Home Rentals.

Q. Tulsa Mobile Home Rentals.

A. Uh huh.

Q. What is the purpose of that corporation?

A. To rent mobile homes.

Q. Do you own mobile homes?

MR. TOM FRASIER: If the Court please, I object to this, being outside the scope.

THE COURT: What is your point here, Mr. Gramah?

MR. GRAHAM: Her tie-in with Mr. Hood, if your Honor please.

THE COURT: Overruled.

Q. (By Mr. Graham) Do you own any mobile homes?

A. Not personally myself, no, sir.

Q. Does your husband?

A. Yes, sir.

Q. How many?

A. Four.

Q. How many does Mr. Hood in that corporation?

A. I don't know.

Q. More than four?

A. Yes, sir.

MR. TOM FRASIER: If the Court please, I object to this again.

MR. GRAHAM: I have one last question on this line.

THE COURT: Overruled. Proceed.

Q. (By Mr. Graham) Are any of those mobile homes in this subsequent corporation the two referred to by Mr. Hymiller earlier today?

A. I have no idea, sir.

MR. TOM FRASIER: If the Court please, I object to this line of questioning, move for a mistrial.

THE COURT: Well, overruled. Any further questions of this witness?

MR. GRAHAM: No further questions.

THE COURT: Step down. Call your next witness.

(Witness withdraws)